No. 10342

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

POLSON LOGGING COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF POLSON LOGGING COMPANY RESPONDENT

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OPINION BELOW

The opinion and Order of the National Labor Relations Board (R. 44-79) is reported in 40 N.L.R.B. 736.

JURISDICTION

Respondent adopts the statement on Jurisdiction set out in Petitioner's (Appellant's) brief.*

STATEMENT OF THE CASE

All employees of the logging operation of the Polson Logging Company constitute a single unit for the

*Pertinent sections of the Act are printed in the Appendix to this brief.

purpose of collective bargaining (R. 49 and 50—note 3). Since 1937 the Polson Logging Company has bargained collectively with the International Woodworkers of America, affiliated with the CIO, for all employees including those employed in the logging railroad classifications (R. 49).

In February, 1940, employees employed in the logging railroad classification wishing to join the Railroad Brotherhoods started organizing for that purpose (R. 138-139). By March 1, 1940, logging railroad employees had signed up with the Trainmen or or the Firemen and had formed a committee to prepare and submit to the Company a working agreement and a request that the Company recognize the train crews as constituting two separate units for the purpose of collective bargaining (R. 156).

On May 18, 1940, this committee submitted the agreement to the Company and requested it be accepted and signed (R. 95). The Company stated that the train crews were within the bargaining unit which had been established since 1935 and they would have to seek legal advice before answering (R. 142), and promised to give the Union a written answer (R. 144). The Company's written answer stated that the request of the Brotherhood Unions raised a question which could only be settled by agreement between the Unions concerned (International Wood Workers and Brotherhood Unions), or, failing in an agreement, by the National Labor Relations Board (Bd. Ex. 3) (R. 93-94). The representation question was submitted to the National Labor Relations Board which, on April 24, 1941, rendered its decision,

holding that the bargaining units contended for by the Trainmen and the Firemen and Engineers were inappropriate and dismissing the petitions of the two Brotherhood Unions (R. 50—Note 3).

On May 21, 1940, Messrs. Lytle and Reece, employed as brakemen on the logging railroad, failed to flag the Axford Prairie Crossing (crossing of main coast highway, Olympic Highway, and Company's railroad) as required by the Company's safety rules (R. 65-66, Board Finding). Both were discharged for failure to comply with the safety rule requiring the flagging of grade crossings of the Olympic Highway and the Company's logging railroad (R. 131-133, Bd. Ex. 5 and 6).

On July 8, 1940, a charge of unfair labor practice was filed with the Board. The charge case was held in abeyance pending the hearing of the representation case decided April 24, 1941 (R. 1, 44, 50). On June 30, 1941, the Brotherhood of Trainmen filed an amended charge (R. 3, 44) alleging Messrs. Lytle and Reece were discharged because of their membership in and activities on behalf of the Brotherhood of Railroad Trainmen.

A complaint was issued by the Board (R. 4 to 9). Respondent answered denying the unfair practices charged in the complaint (R. 9 to 11). After hearings the Board found that Messrs. Lytle and Reece had failed to flag the Axford Prairie Crossing, thus violating the Company's safety rule (R. 65-66), but held the discharge was for Union membership and activity and ordered reinstatement with back pay (R. 73). The Board also found that the Company had

discouraged membership in the Brotherhood Unions and issued a cease and desist order (R. 73-74).

RESPONDENT'S DESIGNATION OF POINTS

The respondent submitted its designation of points (R. 472-473) and will urge points I, III, and IV.

SUMMARY OF ARGUMENT

I. Respondent's objection to and motion to strike the testimony of C. B. Groves (Tr. 162-65) (R. 217-220) should have been sustained for the reason that the agency of Vic Lehman to speak for and bind the Company was not shown.

II. The findings of fact with respect to the unfair labor practices are not supported by substantial evidence. No unfair labor practice is shown by substantial evidence.

III. Since the Board's Order is not supported by substantial evidence it is invalid and should not be enforced.

ARGUMENT

I.

The Board erred in admitting testimony (Tr. 162-165, line 22) (R. 217-220) over respondent's objections and in refusing to grant respondent's motion to strike said testimony admitted over respondent's objection.

At the hearing respondent objected to the testimony of C. B. Groves, an employee employed in the railroad classification as a brakeman, regarding conversation with Vic Lehman, also an employee of the Company (R. 217). Vic Lehman is supposed to have told Mr. Groves to be careful what he said about the Brotherhoods or he might be discharged, to which Mr. Groves replied, "I don't think so." Respondent assigned as grounds for its objection the failure of the Board to show that Mr. Lehman was authorized to speak for or bind the Company or that the statement, if made, was within the authority of Vic Lehman or authorized by the Company (R. 217, 218).

The existence of an agency must be established before statements or declarations are admissible against the principal.

> *First Unitarian Soc. v. Faulkner*, 91 U.S. 415, 23 L. ed. 283;
>
> *U. S. v. Boyd*, 5 How. (U.S.) 29, 12 L. ed. 36.

The burden of proof lies upon the party who introduces the statements of an agent for the purpose of binding the principal to show the declarations were within the agent's authority (20 Am. Jur. Evidence Section 597).

The record is devoid of any showing that Vic Leh-

man, if he made the statement testified to by Mr. Groves, was acting within his authority or as an agent of the respondent. The burden was upon the Board to show by substantial evidence, not only that Vic Lehman made such statement but that it was made within the course and scope of his authority before respondent can be charged therewith. The Board failed to make this showing and respondent's objection (R. 217) and motion to strike (R. 218) should have been sustained.

II.

The Board's finding that respondent interfered with, restrained and coerced its employees in the rights granted by Section VII of the National Labor Relations Act is not supported by substantial evidence.

The Board predicated its finding that respondent had interfered with the rights of the employees guaranteed by Section 7 of the National Labor Relations Act upon the testimony of Mr. Wood, a locomotive engineer, and Nels Hill, a brakeman, Tony Plesha, employed in the railroad construction crew, and the alleged statement of Vic Lehman, testified to by C. B. Groves.

Respondent does not deny the rule that administrative findings if supported by *substantial evidence* are conclusive (italics ours). Respondent does contend that the testimony relied upon by the Board does not meet the test of substantial evidence.

Substantial evidence means more than a mere scintilla. It excludes vague, uncertain, or irrelevant matter. As stated by Judge Hamilton in the decision in the case of the *National Labor Relations Board v.*

Thompson Products, Inc. (U.S. C.C.A. 6) 97 F.(2d) 13, 15:

> "Substantial evidence implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions, and conclusions to be drawn therefrom, and considering them in their entirety in relation to each other arrives at a fixed conviction."

See also

> *Washington, Virginia & Maryland Coach Co. v. N. L. R. B.*, 301 U.S. 142, 147, 57 S. Ct. 648, 650, 81 L. ed. 965.

We shall review briefly the testimony relied upon by the Board to support its finding that respondent interfered with the rights of its employees.

Mr. Wood testified to an alleged conversation with Mr. Ellingson, assistant superintendent (R. 180). Mr. Ellingson is supposed to have inquired about the engine upon which Mr. Wood was working, and stated that there was lots of repair work to be done but that when this work would be done was uncertain because of the Brotherhood trouble (R. 180-181). Mr. Wood testified further that Mr. Ellingson said that Mr. Groves was a trouble maker. Mr. Ellingson denied having made the statements attributed to him by Mr. Wood (R. 281-282).

On cross examination Mr. Wood admitted that Mr. Ellingson did not attribute trouble or anticipated trouble to the Brotherhoods (R. 183). The Board, in its decision, found that Mr. Ellingson had threat-

ened to shut down the Company's operation as a consequence of Brotherhood activities (R. 53). On this point we set forth an excerpt of Mr. Wood's testimony on cross examination:

> "Q. Did he (Mr. Ellingson) say that the Company would shut the whole thing down if there was any trouble?
>
> A. No, he did not." * * * (R. 183)
>
> "Q. Did Mr. Ellingson say that if the men joined the Brotherhood they would shut the plant down?
>
> A. No, sir.
>
> Q. Did he say they would curtail the Company's operations?
>
> A. Not at all." (R. 183)

Mr. Wood, on cross examination, further testified that Mr. Ellingson did not threaten action against Mr. Wood if he joined the Brotherhood nor did he advise him not to join the Brotherhood (R. 184).

The Board relied upon the testimony of Mr. Wood to the effect that Mr. Ellingson said C. B. Groves was leading the men astray. The record is devoid of any showing that C. B. Groves was at all active in Brotherhood organization efforts. As a matter of fact C. B. Groves did not engage in activities for and on behalf of the Brotherhoods. In what respect Mr. Groves is supposed to have led the men astray is left entirely to conjecture. Mr. Ellingson denied having made this statement (R. 381-382).

The Board cannot accept the testimony of its own witness which serves its end and disregard testimony of the same witness inconsistent with the ultimate

finding of the Board. In relying upon the testimony of Mr. Wood to support its finding the Board was pleased to forget and disregard what he said on cross examination. We submit the testimony of Mr. Wood to support the finding of interference does not meet the test of substantial evidence.

The Board relied upon the testimony of Mr. Harlan, a brakeman. According to this witness, Mr. Ellingson stated that the Northern Pacific was going to take over the railroad operations of the Polson Logging Company. Mr. Harlan testified that he had talked to no one about the Brotherhoods except Mr. Lytle (R. 262), another employee, employed in the railroad classification. Nevertheless, the Board found that Mr. Ellingson had discussed the Brotherhood with Mr. Harlan and had stated that C. B. Groves was leading the men astray, and that the Northern Pacific was going to take over the railroad operations. On direct examination Mr. Harlan testified:

> "I don't think we ever talked to Mr. Ellingson,"

and again:

> "I don't think I ever talked to Mr. Ellingson; I know, not about the Brotherhood." (R. 265)

We submit that the testimony of Mr. Harlan not only fails to relate the statement attributed to Mr. Ellingson to the train crew's membership or organizational efforts in the Brotherhoods but positively negatives such finding. It does not meet the test of substantial evidence.

Nels Hill's (a brakeman) testimony was accepted by the Board to show that Mr. Ellingson had said

there were two unions in existence among the employees and that they were fighting one another and that "some day they would all be going down the road." The testimony of Nels Hill should be reviewed in its entirety on this point (R. 265, 285). It was denied by Mr. Ellingson (R. 387, 388) and Frank Landi (R. 416, 417, 418, 419), the foreman of the section crew to whom the statement is alleged to have been made.

On the occasion testified to by Mr. Hill there had been two wrecks on the Company's logging railroad (R. 267). In response to the Board counsel's question as to whether Mr. Ellingson mentioned unions during the conversation, Mr. Hill replied, "No, he didn't mention unions" (R. 269). Much of Mr. Hill's testimony was elicited by leading questions of the Board's counsel. This is particularly true of the testimony relied upon by the Board to support its finding.

Mr. Hill's testimony does not meet the test of substantial evidence.

Mr. Plesha, employed on the railroad construction crew, testified that Mr. Ellingson asked what the men were going to do if the Northern Pacific Railroad took over the Company's logging railroad. On cross examination he refused to say that the statement was made because of any Brotherhood organizational efforts or activities, or membership by the men (R. 312).

Mr. Ellingson denied the statements attributed to him by Mr. Plesha. He specifically stated that Mr. Plesha asked him if the Northern Pacific was going to take over the railroad operation (R. 389).

An engineer, Mr. Fenton, was supposed to have been present when Mr. Ellingson made the statement attributed to him by Mr. Plesha. It is significant that the Board did not call Mr. Fenton to whom the statement was allegedly addressed to testify thereto.

We submit that the testimony of Mr. Plesha does not meet the test of substantial evidence.

The Company's record of labor relations and Union dealings is worthy of considerable weight. The employees were organized in 1935 as members of the AF of L. In 1937 the employees transferred their affiliation to the CIO. The Company has bargained collectively with both Unions. Yet, with a background free from anti union attitude or activity the Board found that in 1940 this Company had set about to engage in a program to interfere with the rights of their employees to join unions and bargain collectively. As we have pointed out the evidence relied upon by the Board is not substantial and in every instance the testimony of the Board's witnesses was inconsistent with the finding of the Board.

It is significant that the unfair labor practice charge in this case was filed on July 8, 1940 (R. 44). On the same date the Brotherhood of Trainmen and the Brotherhood of Enginemen filed separate petitions alleging that a question of representation of the respective employees had arisen and sought an order of the National Labor Relations Board certifying the two Brotherhoods as bargaining agents for the trainmen and firemen and enginemen respectively. Nothing was done regarding the unfair practice charge filed on the same day. Instead, the Board, for some

reason, proceeded to hear and decide the representation case and on April 24, 1941, handed down a decision holding that employees employed as trainmen and as firemen and as enginemen did not constitute separate units for the purpose of collective bargaining and denied the petitions (R. 50, footnote 3). Following this decision and on June 30, 1941, an amendment to the original unfair practice charge, filed July 8, 1940, was filed. It is on the basis of the amended charge that the Board took this case to a hearing. It is a well established policy of the Board to deny a hearing in a representation case if a charge case is pending. The only conclusion that can be drawn from the unusual developments and procedure herein is that the charge was filed as means of bringing pressure upon the Company to grant recognition to the Brotherhood unions despite the existing labor agreement with the IWA Union which covered employees employed in the railroad classifications.

Apparently, after investigation the National Labor Relations Board did not find sufficient facts to support the unfair labor practice charge filed on July 8, 1940. It is significant that the original charge, filed July 8, 1940, and the amended charge, filed June 30, 1941, are identical word for word. The only difference between the two is the paragraphing. It must be assumed that the Board carried out its duty of investigating the charges made on July 8, 1940, and based upon that investigation deemed these charges to be without foundation.

III.

The Board's finding that Messrs. Lytle and Reece were discharged for union activity or membership is contrary to the evidence and not supported by substantial evidence.

The respondent's answer to the Board's complaint admitted that Messrs. Lytle and Reece were discharged. The respondent denied that the discharge was for union membership or activity and alleged the discharge was because of the failure of these men to observe and abide by safety regulations (R. 10 and 11).

Although the Board through its witnesses at the hearing sought to establish the fact that the safety regulations of the Company did not require the brakeman to flag principal crossings of the Olympic highway and the Company's logging railroad, the Board found that the safety rule did require the brakemen to be on the front end whenever the train was pushing one or more cars ahead of the engine and to signal the engineer either to stop or proceed depending upon the conditions observed by them (R. 65).

Messrs. Lytle and Reece were discharged for their failure to abide by such rule (R. 131 and 133, Bd. Ex. 7 and 8). Despite the finding by the Board that the safety rule did exist and that these employees did not abide by it, the Board, nevertheless, held the discharge was for union membership and activities. The Board is not free to indulge in conjecture but is bound by the record. To support its Order the Board indulged in some fanciful reasoning that under the circumstances existing the infraction of the safety rule was

inconsequential (R. 66). The Act does not authorize the Board to pass judgment as to the necessity for any safety rule or regulation yet this is the basis upon which the Board refused to find that safety rule violation by Messrs. Lytle and Reece was the grounds for the discharge.

It is surprising that a rule made to protect the Company and the public using state arterial highways was so lightly treated by the Board. In the Board's decision it states "We are unable to assume that the incident in question was the first breach in that rule which had been observed by the respondent's officials" (R. 67). The Board is not permitted to indulge in assumptions of facts not shown in the record. Respondent's witnesses including Company officials testified that they had not observed prior infractions of this rule (R. 366-7, 408, 437, 440, 441). Although the Board sought to prove by its witness that officials of the Company had ridden on trains across highway crossings when the brakemen did not flag it, the Board witness admitted that the crossings were flagged (R. 463).

The safety rule requiring the flagging of the crossings was established to the satisfaction of the Board. Its violation was admitted by the employees concerned and the Board so found. Under the circumstances the discharge was rightful and the Board is not permitted to predicate its decision upon whether or not the violation of the employees' duty was serious. (*N.L.R.B. v. Thompson Products, Inc.* (C.C.A. 6) 97 F. (2d) 13, 17.

We submit that the Order of the Board directing the reinstatement of Messrs. Lytle and Reece is not supported by substantial evidence.

CONCLUSION

The evidence upon which the Board relied to support this finding does not possess that "quality of proof which induces conviction and makes an impression on reason" (*National Labor Relations Board v. Thompson Products Inc.* (U.S. C.C.A. 6) 97 F.(2d) 13).

Respectfully submitted,

R. W. MAXWELL,
Attorney for Respondent.

APRIL, 1943.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U.S.C., 1940 ed., Sec. 151, *et seq.*), are as follows:

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"SEC. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * *

"(3) By discrimination in regard to hire, or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *"